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No. 07-1412

FILED
JUN 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BRYAN ALLEN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Arizona Court of Appeals err in finding that an officer's act of lifting the corner of an unlocked cloth car cover placed over a vehicle parked in an open parking lot was not a search; or by finding, in the alternative, that if lifting the car cover was a search, the intrusion was *de minimis* and did not require suppression of evidence derived from that search?

PARTIES

Petitioner is Bryan Allen, the defendant in the underlying criminal case. Respondent is the State of Arizona.

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COUNTER-STATEMENT OF THE CASE

Shortly after midnight on October 22, 2005, a civilian witness was stopped in his westbound vehicle at a red light in Tempe, Arizona. While waiting for the light to change, he saw a red sports car approaching northbound on the cross street at a speed he estimated at eighty miles per hour. When the car reached the crest of the intersection, it became airborne, struck the pavement, bounced into the air again, and continued northbound. As the car left his view, the witness heard a thud from the direction in which the car was heading and saw something fly through the air. After the traffic light changed, he turned and drove northward. He discovered a dead body about 200 feet north of the intersection.

The witness called 911. When Tempe Police Sergeant Butler arrived, the witness told Sgt. Butler what he saw and identified the vehicle as a red Mitsubishi 3000 GT two-door sport coupe, explaining that he could identify the car so precisely because he had worked in an auto body shop. Sgt. Butler also observed substantial debris in the roadway, including red-painted automobile parts. Sgt. Butler knew from the debris and blood at the scene that the damage to the vehicle involved in the collision would be significant. He stayed at the scene until about 3:30 a.m., when other officers relieved him.

Sgt. Butler then decided to check the surrounding neighborhoods for the car involved in the collision. He drove through various apartment complexes

in the area looking for red sports cars, occasionally stopping to look at particular cars. He drove to a nearby apartment complex with a lighted, open, ungated, unguarded parking lot. As he entered the lot, he saw a red car parked in an area of the lot with covered parking. The car was partially covered with an elastic-banded gray opaque tarp that left the bottom twelve to fifteen inches of the vehicle exposed.

Sgt. Butler lifted up a portion of the cloth car cover at the front of the vehicle and saw extensive damage to the right headlamp assembly. Raising the cover further on the passenger side, he observed additional severe damage to the front passenger side window and roof. He then lifted the cover at the back of the car to obtain the license plate number. Based on the plate number, Sgt. Butler was able to identify Allen as the owner of the vehicle and contact him regarding the collision. Allen and his girlfriend then made statements to the police.

Allen was indicted under Arizona law for leaving the scene of a fatal accident. He moved to suppress the evidence of the damage to his car and statements he made to the police, claiming they were obtained as a result of an unlawful search in violation of his rights under the Fourth Amendment to the United States Constitution and Article 2, Sections 4 and 8, of the Arizona Constitution. The trial court held a suppression hearing.

The petitioner argues at page four of the Petition for Certiorari that, at the suppression hearing, Sgt.

Butler "conceded that lifting the car cover to examine the vehicle was a random act, unsupported by even a hunch." He also argues at page five of the Petition that "because the car was covered, he could not determine the car's make or model . . . and he could not even tell if the color of the car matched the shade of the debris left at the accident scene."

The petitioner's arguments misstate and mischaracterize the evidence presented. Sgt. Butler testified at the hearing that he could tell from the exposed bottom portion of the car that it was a red low-profile two-door sports coupe – the same type of car that the witness had described – although he could not see what make the car was and did not know if it was the exact shade of red as the car parts found at the crash scene.

When defense counsel asked Sgt. Butler if he had "a hunch that that car had been involved in the accident before lifting the car cover," the sergeant replied, "I did not." However, when defense counsel asked, "Lifting the car cover was completely random then?", Sgt. Butler replied that things he observed made him suspicious of the vehicle, including the fact that the car was parked in covered parking but also had a cloth car cover. Further, the passenger's side door was closed on the seat belt, which was hanging outside of the door. Thus, Sgt. Butler denied checking the car on a hunch or at random; instead, he set out facts that made him suspect that the vehicle under the car cover might have been the one involved in the fatal crash that morning.

The trial court granted the motion to suppress, finding that Allen had shown that he "subjectively demonstrated an objectively reasonable expectation of privacy when he covered his car with the dark tarp." Citing *United States v. $277,000 in U.S. Currency*, 941 F.2d 898 (9th Cir. 1991) ("*$277,000*"), the trial court concluded that Sgt. Butler's lifting the car cover without probable cause constituted an unlawful search under both the United States and Arizona Constitutions. On the State's motion, the trial court dismissed the case without prejudice.

The State then appealed and the Arizona Court of Appeals reversed the trial court's suppression order. The Court assumed that Allen put the cloth cover over the car with the subjective intent to hide the damage caused by the collision, but stated that, even if Allen had a *subjective* expectation of privacy, he had no *objectively reasonable* expectation of privacy in the exterior appearance of his car. *State v. Allen*, 216 Ariz. 320, 323-25, ¶¶ 14-16, 166 P.3d 111, 114-16 (Ariz. Ct. App. 2007). The Arizona Court distinguished *$277,000*, finding that *$277,000* did not compel the conclusion that lifting a car cover necessarily constitutes a "search" for Fourth Amendment purposes, because the Ninth Circuit "did not consider the distinction recognized in the law between viewing the exterior of a vehicle and physically entering the vehicle." *Id.* at 325, ¶ 21, 166 P.3d at 116. Allen had no right to privacy in the parking lot because the parking lot was accessible to the public, and "[t]he lifting of the car cover to view the exterior of the

vehicle likewise did not invade any reasonable expectation of privacy." *Id.* at 326, ¶ 23, 166 P.3d at 117.

Finally, the Arizona Court recognized that some actions may amount to a search but may nevertheless be "reasonable."

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

United States v. Knights, 534 U.S. 112, 118-19 (2001) (internal quotation marks omitted). The Arizona Court stated that, even assuming that Sgt. Butler's actions constituted a search, "Allen had a very limited privacy interest, if any, in shielding the exterior appearance of his car from public view." *Allen,* 216 Ariz. at 326, ¶ 25, 166 P.3d at 117. The governmental interest in investigating a fatal hit-and-run accident had to be weighed against the petitioner's possible privacy interest. The Arizona Court concluded that, under these circumstances, the search was reasonable under the Fourth Amendment. *Id.* at ¶ 26.

Finally, the Arizona Court held that, although Article 2, Section 8 of the Arizona Constitution provides greater privacy rights for a person's *home* than the Fourth Amendment does, the Arizona Constitution does not provide greater protections than the

Fourth Amendment does for a person's automobile. The Arizona Court concluded that Sgt. Butler's lifting the car cover was not a search, or, if it was a search, it was not an "unreasonable" search. The Court concluded that Sgt. Butler's actions did not violate any privacy rights under either the Fourth Amendment or the Arizona Constitution. *Allen*, 216 Ariz. at 327, ¶ 28, 166 P.3d at 118.

The petitioner sought relief from the Arizona Supreme Court. That Court summarily declined review. The petitioner has now petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The petitioner asserts that this Court should grant certiorari for three reasons. First, he argues that this Court should grant certiorari because the issue is "one of first impression" in this Court. (Pet. for Cert. at 6.) However, in *Cardwell v. Lewis*, 417 U.S. 583 (1974), a plurality of this Court held that police could examine the exterior of a vehicle at a police impoundment lot and take paint scrapings without any need for a warrant. This Court reasoned:

> In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the "search" limited to the examination of the

> tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, if it can be said to exist, is abstract and theoretical.

Id. at 591-92 (citation, internal quotation marks, and footnotes omitted). The Arizona Court of Appeals cited this same portion of *Cardwell* in its Opinion in this case. Further, in *New York v. Class*, 475 U.S. 106, 114 (1986), a majority of the Court expressly endorsed the *Cardwell* plurality's conclusion that an examination of the exterior of a vehicle "does not constitute a [Fourth Amendment] 'search'" because the exterior of a vehicle "is thrust into the public eye."

It follows that this Court has decided the issue presented in this case. Petitioner Allen's case does not become one of first impression simply because *Class* did not involve a car cover.

Second, the petitioner argues that this Court should grant certiorari because the Arizona Court of Appeals would "allow police officers to engage in roving suspicionless searches." (Pet. for Cert. at 6.) "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). The petitioner presents the issue as whether the Fourth Amendment requires suppression of evidence derived from a police officer's lifting the corner of a car cover "without probable cause or even

an individualized suspicion to support the search." (Pet. for Cert. at i.) This mirrors his assertion that Sgt. Butler's "lifting the car cover to examine the vehicle was a random act, unsupported by even a hunch." (Pet. for Cert. at 4.) In other words, the petitioner attempts to characterize Sgt. Butler's acts as an unreasonable search, based on his assertion that Sgt. Butler lacked any individualized suspicion that the car under the cover was the one involved in the fatal hit-and-run crash.

The petitioner has mischaracterized the issue, first, by assuming that there was a search at all, and second, by asserting that the resulting search was unreasonable because the officer lacked any individualized suspicion. In fact, because Allen had no objectively reasonable expectation of privacy in the exterior of his vehicle, there was no search.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Arizona Court properly found that Sgt. Butler's lifting the corner of the car cover did not constitute a search because placing an unlocked canvas car cover on a car parked in an open, ungated, unguarded parking lot did not create any objectively reasonable expectation of privacy in the exterior of the vehicle. *Allen*, 216 Ariz. at 326, ¶ 23, 166 P.3d at 117.

Further, even if lifting the car cover were characterized as a search, the intrusion, if any, was minimal and based on individualized suspicion. The record makes it clear that Sgt. Butler did not lift the car cover at random or on a hunch. Instead, the sergeant explained that what he could see of the car matched the eyewitness's description; the car was parked in covered parking and also covered with a cloth cover; and the passenger's side seat belt was hanging out of the car door. All of these factors, plus the fact that the car was parked close to the crash scene, provided ample justification for the minimally-intrusive search.

Finally, the petitioner argues that this Court must grant certiorari because the Arizona Court of Appeals has not followed *$277,000*, a case he states is "markedly similar" to his own. (Pet. for Cert. at 9.) He states, "[T]he Arizona Court of Appeals has issued a Fourth Amendment Opinion explicitly conflicting with the Ninth Circuit Court of Appeals interpretation of the same factual scenario and expressly disregarding the Ninth Circuit's holding." (Pet for Cert. at 7.) Additionally, he argues that the Arizona Court erred in refusing to "follow . . . Ninth Circuit precedent." He concludes that this Court must grant certiorari and order the Arizona courts to follow *$277,000*.

This argument also fails, for two main reasons. First, as the Arizona Court of Appeals recognized, Ninth Circuit case law is not binding on Arizona courts. *Allen*, 216 Ariz. at 325, ¶ 21, n. 4, 166 P.3d at

116. On federal constitutional issues, Arizona courts are bound only by decisions of Arizona's appellate courts and this Court.[1] In addition, as the Arizona Court of Appeals stated, in *$277,000*, the Ninth Circuit simply concluded that the officer's looking under the car cover was a search "without any analysis or citation to authority." *Id.* at ¶ 21. *$277,000* is neither binding nor persuasive in the petitioner's case.

Second, the petitioner's argument fails because *$277,000* did not present "the same factual scenario" as the petitioner's case. *$277,000* was a civil forfeiture case, not a prosecution for any crime involving a vehicle. The officers had no reason to believe that any crime had been committed involving any vehicle – they went to the scene only to investigate a loud music call. The vehicles were parked in the back yard of a private home, not in a publicly-accessible parking lot. Nothing about the vehicles suggested that the vehicles had been stolen or were involved in any other criminal activity. Finally, the intrusion involved in *$277,000* was much greater than lifting the car cover a few inches. The officer in *$277,000* not only lifted the car cover, he removed it entirely, and then

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[1] *See, e.g., State v. Dann*, 206 Ariz. 371, 372, ¶ 2, n. 2, 79 P.3d 58, 59 (2003) ("We are not bound by the Ninth Circuit's interpretation of what the Constitution requires" (citing *State v. Vickers*, 159 Ariz. 532, 543, n. 2, 768 P.2d 1177, 1188 (1989) (Recognizing disagreement with Ninth Circuit, but stating, "Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them")).

he broke into the locked vehicle and searched it. In light of those facts, it is not surprising that the government conceded in that case that the officer had conducted a search. *$277,000* at 901.

The facts in the case at bench are quite different and readily distinguishable. Unlike the officers in *$277,000*, *supra*, who had no reason to believe the vehicles parked in the back yard had been involved in any crime, Sgt. Butler was investigating a fatal hit-and-run accident that had occurred nearby only three hours before. An eyewitness had provided a detailed description of the car, including its color, make, and model. Sgt. Butler knew that the right front of the car was heavily damaged. He drove through parking lots of apartment complexes close to the scene of the accident trying to locate the car.

Sgt. Butler noticed a vehicle matching the eyewitness's description parked in a covered parking space in an open, ungated, unsecured parking lot. Even though the car was parked in a covered spot, it was partially covered with a cloth cover, and the passenger-side seatbelt was hanging out of the vehicle. Based on these facts, Sgt. Butler decided to check to see if the car was the one involved in the fatal accident. He lifted the right front corner of the car cover just far enough to see that the vehicle had extensive damage. He then lifted up the back of the car cover just far enough to get the license plate number. He did not even remove the car cover, much less break into the car. Thus, under the facts of this case, the Arizona Court of Appeals properly refused to

follow *$277,000*'s overbroad statement suggesting that removing a car cover is always a search.

Finally, this Court should decline certiorari because this Court decided in *New York v. Class*, 475 U.S. 106, 114 (1986), that "[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist." The Arizona Court correctly held that lifting the car cover was not a search because no one has an objectively reasonable expectation of privacy in the exterior appearance of a car that is parked in an open, publicly accessible, ungated, unguarded parking lot.

In his Petition for Writ of Certiorari, the petitioner continues to cite and rely on *$277,000*. He asserts that his "privacy expectation in his car's outward appearance was objectively reasonable under the circumstances and falls easily within the Fourth Amendment's scope." (Pet. for Cert. at 9.)

The petitioner's argument must fail. The Arizona Court expressly considered and rejected Allen's analysis of *$277,000*. The Arizona Court explained that in *$277,000*, the officer did not merely lift one corner of the car cover – he took the entire car cover off and then broke into the locked vehicle. Thus, the Ninth Circuit implied that lifting a car cover was the equivalent of breaking into the interior of a vehicle. In so doing, the Arizona Court said, the Ninth Circuit failed to "consider the distinction recognized in the law between viewing the exterior of a vehicle and physically entering the vehicle" articulated in

Cardwell v. Lewis, 417 U.S. 583 (1974) and *New York v. Class*, 475 U.S. 106 (1986). *Allen*, 216 Ariz. at 325, ¶ 21, 166 P.3d at 116.

The Arizona Court reasoned that this Court has never held that there is any reasonable expectation of privacy in a vehicle's exterior. *Allen*, 216 Ariz. at 324, ¶ 16, 166 P.3d at 115. As the Arizona Court explained, Sgt. Butler made no entry into the vehicle. Further, the Arizona Court noted that "the fact that Allen sought to hide the damage to his vehicle by using a car cover" did not "determine whether he had an objectively legitimate expectation of privacy in the exterior appearance of his car." *Id.* at ¶ 15 (citing *Oliver v. United States*, 466 U.S. 170, 182-83 (1984)).

In addition, this Court and lower federal courts have repeatedly considered cases in which officers touched the exterior of a car to determine if the engine was warm, and none of these cases involved any claim that merely touching the exterior of a vehicle was a search. *See, e.g., United States v. Knights*, 534 U.S. 112, 115 (2001) (Deputy felt the hood and found that it was warm); *Joseph v. Coyle*, 469 F.3d 441, 447 (6th Cir. 2006) (Deputy testified that hood and radiator of car were warm to the touch); *Caputo v. Nelson*, 455 F.3d 45, 47 (1st Cir. 2006) (Car's hood was warm to the touch); *United States v. Byrd*, 403 F.3d 1278, 1281 (11th Cir. 2005) (Officer reached underneath car's bumper and felt the radiator, finding that it was hot). As the State pointed out below, if the officer in this case had simply felt the damage through the car cover, there would clearly be

no search. It would elevate form over substance to hold that the officer's conduct here was a search because he used his sense of sight rather than his sense of touch to determine that he had found the car involved in the fatal crash.

No federal case directly holds that it is not a search for an officer to touch the hood of a vehicle. However, in *Goldberg v. State*, 95 S.W.3d 345 (Tex. App. 2002), the police touched the hood of a vehicle that they believed had been driven by a suspect and found that it was still warm. The Texas court specifically said that touching the vehicle's hood "was not a search, but was simply a physical examination of the exterior of the vehicle." *Id.* at 365 (citing *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974)). The Texas court's holding is consistent with this Court's holdings in *Class* and *Cardwell* and with the Arizona Court of Appeals holding in this case.

The Arizona Court also correctly noted that in *State v. Ball*, 219 N.J. Super. 501, 508, 530 A.2d 833, 837 (N.J. Super. Ct. App. Div. 1987), the New Jersey court held that a police officer did not conduct a search within the meaning of the Fourth Amendment by removing a blanket that covered the engine area of a pickup truck. Citing *Class*, the New Jersey court reasoned that the engine was not located within the passenger compartment or the trunk of the vehicle, in which an owner or occupant would have some legitimate expectations of privacy. Also, the court reasoned that placing a blanket over the engine compartment

would ordinarily be designed to protect it from the elements, not to "shield it from public view." *Id.*

In short, the Arizona Court of Appeals properly held that the petitioner had no objectively reasonable expectation of privacy in the exterior of his car while the car was parked in an open, ungated, unguarded parking lot. The fact that the petitioner attempted to conceal evidence of his crime by placing an elastic-banded cloth car cover on the car did not give him an objectively reasonable expectation of privacy. Therefore, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all the reasons stated in the Arizona Court of Appeals decision and in this Brief in Opposition, the State of Arizona asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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